

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
GARY E. SILVA }

Appearances:

For Appellant: C.R.E. Smith
Attorney at Law

For Respondent: Michael E. Brownell
Counsel

O P I N I O N

This appeal is made pursuant to section 18646 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the petition of Gary E. Silva for reassessment of a personal income tax jeopardy assessment in the amount of \$142,100 for the period January 1, 1976, through December 9, 1976.

Appeal of Gary E. Silva

The questions presented for decision are: (1) whether appellant received unreported income from illegal sales of narcotics; and (2) if he did, whether respondent properly reconstructed the amount of that income.

The following summary of facts, except where indicated, is taken from arrest reports of the State Bureau of Narcotic Enforcement of the Department of Justice. On December 9, 1976, appellant and seven other people were arrested as the result of a major police effort to crack the "Simon Sotelo Organization," which was believed to be the principal supplier of heroin and cocaine to dealers operating in Alameda, Contra Costa, and Santa Clara Counties. Information leading to the arrests came from Herbert Matsumoto, the Sotelo Organization's bookkeeper. Mr. Matsumoto was also a major participant in the organization's drug smuggling, distribution, and collection operations. On November 5, 1976, he was arrested while attempting to sell cocaine to a special agent of the Bureau of Investigation and Narcotic Enforcement (BINE). After his arrest, Herbert Matsumoto cooperated with the BINE and provided detailed information concerning the Sotelo Organization's narcotics operation.

In an affidavit in support of issuance of a search warrant, d'ated December 6, 1976, Matsumoto disclosed that he would meet on Monday nights with two leaders of the organization, Rick Berlanga and Simon Sotelo. At those times, he would receive cocaine and heroin needed for the following week's transactions. During the week following a meeting, he would exchange the narcotics he received on Monday night for cash with eight individuals whose names were supplied by Rick Berlanga. One of the eight named individuals was appellant. Between August 1976 and September 27, 1976, Matsumoto deposited cocaine and picked up money from public lockers, one of which, he was informed by Rick Berlanga, was for appellant's deliveries.

On September 27, 1976, Mr. Matsumoto found that \$60,000 in cash and four kilograms of cocaine were missing from one of the lockers. Thereafter, exchanges were made face to face. The location of these exchanges varied according to the date and, the individual. One of the exchanges sworn to by Matsumoto took place on October 31, 1976, at Gary's Building Supply in Hayward, appellant's place of business. On that occasion, Mr. Matsumoto delivered one kilogram of cocaine to appellant and was paid \$39,500 from appellant's office safe. On another occasion, on November 2, 1976, Mr. Matsumoto called

Appeal of Gary E. Silva

appellant to inquire if he needed any cocaine. He was instructed to come to appellant's place of business to pick up money owed. On that occasion, he received \$53,000 from appellant, which appellant gave to him from his office safe. Mr. Matsumoto kept a record in a coded notebook of all the cocaine and heroin which he distributed between August 1976 and November 5, 1976. This record shows that from August 27, 1976, to November 2, 1976, he delivered 32.5 kilograms of cocaine to appellant and received **\$1,363,660** in payment.

On December 9, 1976, appellant was arrested. His residence, his place of business, and his pickup truck were searched. A briefcase containing \$34,920 in cash was found in the pickup truck. Cash in the amount of \$691 was found at appellant's place of business, and \$3,880 in cash was found on appellant's person. Respondent was notified of appellant's arrest. Based upon Herbert Matsumoto's records of narcotics sales to appellant, respondent estimated appellant's taxable income to be **\$1,300,000**. A jeopardy tax assessment was issued against appellant for \$142,100. Appellant was subsequently convicted of conspiracy to possess cocaine for sale.

Appellant concedes that he picked up 32.5 kilograms of cocaine from Herbert Matsumoto, but appellant claims that he was not dealing for his own account. Appellant claims that he was hired by Rick Berlanga to make deliveries. According to appellant, Matsumoto would deliver a kilogram of cocaine to appellant with instructions as to who should receive it. Appellant would then deliver the kilogram as instructed and pick up \$40,000 in exchange. He would deliver the \$40,000 to Matsumoto and be paid \$500 for his services. Appellant acknowledges that he delivered a total of 32.5 kilograms and was paid a total of \$16,250.

Each taxpayer is required to maintain accounting records that will enable him to file an accurate return. (Treas. Reg. **§ 1.446-1(a)(4)**; Former Cal. Admin. Code, tit. 18, reg. 17561, subd. (a)(4) (repealer filed June 27 1981; Register 81, No. 26).) In the absence of such records, the taxing agency is authorized to compute a taxpayer's income by whatever method will, in its judgment, clearly reflect income. (Rev. & Tax. Code, **§ 17561**, subd. (b).) The existence of unreported income may be demonstrated by any practical method of proof that is available. (Davis v. United States, 226 F.2d 331 (6th Cir. 1955): Appeal of John and Codelle Perez, Cal. St.

Appeal of Gary E. Silva

Bd. of Equal.; Feb. 16; 1971.) Mathematical exactness is not required. (Harold E. Harbin, 40 T.C. 373, 377 (1963).) A reasonable reconstruction of income is presumed correct, and the taxpayer bears the burden of proving that it is erroneous. (Breland v. United States, 323 F.2d 492, 496 (5th Cir. 1963); Appeal of Marcel C. Robles, Cal. St. Bd. of Equal., June 28, 1979.)

To determine if appellant received income from the illegal sales of narcotics, we must first decide whether the record supports appellant's claim that he was a mere courier rather than a dealer in narcotics. On respondent's side of the issue, we have Herbert Matsumoto's statement that appellant was a major seller/distributor in the Sotelo Organization. He was personally given access to a storage locker, and records kept by Matsumoto disclose that appellant purchased **\$1,303,660** worth of cocaine. A statement submitted by Forrest E. Jones, Jr., supervising special agent of the BINE and a narcotics enforcement investigator for over twenty years, reports that, in his opinion, the facts disclosed by the arrest indicate that appellant was not a courier but was a major wholesale cocaine dealer. Chief among the indicators is the fact that appellant had \$34,920 in currency in his briefcase and \$3,880 on his person at the time of his arrest.

In his defense, appellant contends **that** he was employed by Rick Berlanga to deliver packages to three customers. Appellant contends that he cannot disclose the names of these three customers because he fears for his life. With respect to the approximately \$40,000 in his possession at the time of his arrest, appellant contends that \$29,000 was a loan from seven unidentified friends which he intended to use as a down payment on the purchase of a store in Placerville. The other \$11,000 he claims he earned from Rick Berlanga.

We do not find appellant's statements credible in the face of the evidence in this record. Herbert Matsumoto's notebook shows that the total amount of drug purchases made through the Sotelo Organization during the period in question was **\$2,722,100**. Appellant was the single largest conduit for such purchases with **\$1,303,660** worth of transactions, representing 48 percent of the organization's distribution. The next largest dealer purchased 31 percent of **the organization's** narcotics, and six other individuals purchased the remaining 21 percent. We think that it is unlikely that almost half of the organization's narcotics sales would have been entrusted

Appeal of Gary E. Silva

and registered to a mere runner. If appellant were only a courier, we would expect that his duties would be limited to the transportation of drugs. Instead, appellant was the only distribution contact for 48 percent of the organization's sale of narcotics. Further, Herbert Matsumoto, in his affidavit in support of the issuance of a search warrant, describes exchanges on October 31, 1976, and November 2, 1976, at appellant's place of business. During these exchanges, appellant took \$39,500 and \$53,000 on these respective dates from his office safe to pay for drugs. Matsumoto's notebook also shows that appellant had access to large amounts of cash on other occasions. For example, he paid Matsumoto \$115,080 on October 18, 1976, \$81,000 on October 21, 1976, and \$80,240 on October 8, 1976. We do not believe a mere runner who received only \$500 per kilogram of cocaine for deliveries would be entrusted with such large amounts of cash or would be keeping the cash in his office safe. Further, since presumably a runner is used by a dealer to protect the dealer from arrest while carrying narcotics, there is no reason a runner would be necessary for cash deliveries. There is no crime involved in merely transporting large amounts of cash.

Other points in appellant's version of the facts also lack credibility. Appellant contends that he was employed by Rick Berlanga to deliver packages to three customers. However, the record shows that Herbert Matsumoto was employed by Rick Berlanga to deliver drugs and accept payments on behalf of the organization. It seems unlikely that one organization distributor would go to a rented locker to leave narcotics for another organization runner to finally distribute to a customer; or would call that runner to ask how many narcotics were needed by a customer; or would go to that runner's office to receive large amounts of cash from that runner's office safe. Matsumoto's notebook containing the names of eight primary dealers was in his possession at the time of his arrest. Appellant's account was one of the eight listed. We think that it is improbable that a courier would have an account in his own name and that drug purchases would be credited to him rather than to the principal dealer.

Finally, there is the question of the large amount of cash in appellant's possession at the time of his arrest. Appellant does not contend that the money belonged to the principal dealer, but instead claims that \$29,000 represents loans from seven friends to acquire certain real estate. Appellant offers no evidence in support of his claim. The seven friends are unidentified. Respondent states that it has received no third party claims for this money.

Appeal of Gary E. Silva

This record shows that appellant had access to large amounts of narcotics and cash and that he was directly involved in ordering drugs. We find these facts to be inconsistent with his claim that he was a mere courier. Appellant's proof in rebuttal consists solely of his own self-serving testimony which outlines an explanation which we do not find credible. Therefore, we believe that respondent reasonably concluded that appellant was a principal dealer of drugs in the Simon Sotelo Organization.

The next issue for our determination is whether respondent reasonably reconstructed appellant's income. In reconstructing appellant's income, respondent determined from Matsumoto's notebook that appellant purchased \$1,303,660 worth of drugs from August 27, 1976, to November 2, 1976. Respondent then assumed that appellant sold the cocaine for at least twice what he had paid for it, thereby realizing \$1,303,600 in income, which respondent approximated to an even \$1,300,000.

In support of its 100 percent markup, respondent used information supplied by the BINE pertaining to markups, with respect to the sale of narcotics. A statement by Mr. Forrest E. Jones, Jr., BINE supervising special agent, reports that investigations and interviews conducted by the BINE show that persons purchasing cocaine or heroin in kilogram quantities have a firm expectation of a 100 percent to 300 percent profit.

The existence and amount of unreported income may be demonstrated by any practical method of proof that is available. (Appeal of Karen Tomka, Cal. St. Bd. of Equal., May 19; 1981.) In the present case, the level of drug sales attributed to appellant for the period from August 27, 1976, to November 2, 1976, was determined directly from the record of the Sotelo Organization's bookkeeper. The estimated selling price was derived from data compiled by the State Department of Justice Bureau of Investigation and Narcotic Enforcement. In the Appeal of Eduardo L. and Leticia Raygoza, decided by this board on July 29, 1981, we upheld respondent's use of reliable law enforcement data to sustain a determination that the taxpayers in that case had been selling their narcotics at a 100 percent profit. Further, appellant has offered nothing to dispute respondent's calculation. We therefore find that respondent's reconstruction of appellant's income from drug sales is reasonable.

Appeal of Gary E. Silva

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the petition of Gary E. Silva for reassessment of a personal income tax jeopardy assessment in the amount of \$142,100 for the period January 1, 1976, through December 9, 1976, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of February, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9